S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

Estate of ANDREW BALL, JR.

KAREN ELAINE KEYWORTH, Personal Representative for the Estate of ANDREW BALL, JR, and ELAINE PULLEN BALL

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS, and GRAND RAPIDS HOME FOR VETERANS

Defendants-Appellants.

UNPUBLISHED
August 26, 2014

No. 314861
Court of Claims
LC No. 12-000128-MH

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

HOEKSTRA, J., *(dissenting).*

I respectfully disagree with the majority's conclusion that the "medical care and treatment" exception to governmental immunity created by MCL 691.1407(4) extends to claims of ordinary negligence. Because I believe this exception only applies to claims involving medical malpractice, and plaintiff has not brought such allegations, I would reverse and remand for entry of summary disposition in defendants' favor under MCR 2.116(C)(7).

Under the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, "governmental agencies are immune from tort liability when engaged in a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000); see also MCL 691.1407(1). The immunity from tort liability provided by MCL 691.1407(1) "is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki*, 463 Mich at 156. There are several statutory exceptions to governmental immunity; but these exceptions must be narrowly construed. *Id.* at 158. Among the statutory exceptions to governmental immunity is the "medical care and treatment" exception created by MCL 691.1407(4), which states:

> This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or

> treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health or a hospital owned or operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant.

Relying on this provision, plaintiff asserts that her negligence based tort claims are not subject to governmental immunity, while defendants respond that MCL 691.1407(4) creates an exception to the broad grant of governmental immunity only in cases involving medical malpractice. Resolution of the issue requires interpretation of MCL 691.1407(4) to ascertain whether the Legislature intended to allow pursuit of any tort claim arising in the general context of a governmental actor's provision of medical care and treatment, or only those acts constituting medical malpractice.

When undertaking statutory interpretation, courts aim to discern and give effect to the Legislature's intent. *Nawrocki*, 463 Mich at 159. Thus, analysis begins with the plain language of the statute, following the principle that "the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Id.* When the Legislature does not define words, courts may consult a dictionary. *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 633; 765 NW2d 31 (2009). When interpreting words, it is also well-recognized that a word or phrase is given meaning by its context or setting. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 114; 754 NW2d 259 (2008).

The relevant statutory language at issue in this case indicates that governmental agencies are not immune "with respect to providing medical care or treatment to a patient." MCL 691.1407(4). Considering the plain language of the statute, reference to the provision of "medical care or treatment to a patient" clearly implicates only those cases involving medical malpractice claims. That is, the statute denotes the provision of care or treatment in the course of a professional relationship involving the exercise of medical judgment. See *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004) (explaining that medical malpractice is distinguished by the existence of a professional relationship and the exercise of medical judgment).

Specifically, the statute references medical care and treatment provided to "a patient." Patient means one who is "suffering from any disease or behavioral disorder and is under treatment for it." *McLean v McElhaney*, 289 Mich App 592, 602; 798 NW2d 29 (2010) (citation omitted). Applying this definition establishes the necessity of demonstrating a professional relationship in order to invoke the statutory exception. In addition, the exception only applies when "medical care or treatment" is being provided. According to an ordinary dictionary definition, "medical" may be defined as "of or pertaining to the science or practice of medicine." *Random House Webster's College Dictionary* (1992). Thus, "medical care" consists of care pertaining to the practice of medicine. To "practice" medicine involves engaging in the "exercise or pursuit" of the "profession" of medicine. *Random House Webster's College Dictionary* (1992); see also *Stedman's Medical Dictionary* (26th ed.). The word "treatment" has a variety of meanings, including, relevant to its context in the present statute, "the application of

medicines, surgery, therapy, etc., in treating a disease or disorder." *Random House Webster's College Dictionary* (1992).

As these definitions make plain, the exception to governmental immunity at issue only applies to providing care and treatment that implicates the practice of medicine, that is, those acts of care and treatment necessitating the exercise of professional medical judgment and expertise of the type that would require expert testimony to evaluate. Because the statute envisions the exercise of medical judgment in the course of a professional relationship, it clearly exempts only medical malpractice claims from the protections of governmental immunity. See generally *Bryant*, 471 Mich at 422-423.

In contrast to this conclusion, plaintiff and the majority rely on *Bryant* for the unremarkable proposition that acts of ordinary negligence may occur while an individual is receiving medical care, see *id.* at 421, and plaintiff asserts that, therefore, any tort arising in the context of medical care must be actionable under MCL 691.1407(4). However, although *Bryant* is instructive in distinguishing a medical malpractice claim from a claim of ordinary negligence, it did not consider whether claims of ordinary negligence arising in the general context of medical care are exempt from the protections of governmental immunity. That question can only be answered by reference to the plain language of MCL 691.1407(4) which had no part in the decision in *Bryant*. In my opinion, because acts of ordinary negligence do not implicate medical judgment, they do not involve medical care or treatment and thus they do not fall within the exception created by MCL 691.1407(4).

Specifically, as explained in *Bryant*, 471 Mich at 423, acts of ordinary negligence, unlike acts giving rise to medical malpractice claims, do not implicate medical judgment, which can only be established through expert testimony, and instead fall within the realm of a jury's common knowledge and experience. As *Bryant* recognized, such ordinary acts of negligence might occur "at the time" an actor is engaging in medical care. *Id.* at 421. It does not follow, however, that such acts occur "*with respect to providing* medical care or treatment to a patient" as required to trigger the applicability of MCL 691.1407(4). That immunity is lifted only "with respect" to providing medical care or treatment demonstrates the relational role the alleged negligence must have to the provision of medical care or treatment in order to trigger the exception. That is, the challenged act or omission must specifically occur in reference to providing medical care or treatment, not merely at the same time or in the general context of medical care. See *Random House Webster's College Dictionary* (1992) (defining "respect" in the context of "with respect" as a "relation" or "reference" to something).

Considering the implications of the "with respect" language, when a medical professional undertakes acts or makes decisions "with respect," or in reference, "to providing medical care or treatment to a patient," by necessity, he or she exercises some level of medical judgment indicative of the practice of medicine, thereby bringing any resulting claim within the sphere of medical malpractice and the exception created by MCL 691.1407(4). In contrast, a medical professional's acts of ordinary negligence within the realm of a jury's common knowledge, even if those acts occur in a hospital or other medical setting, do not implicate the medical judgment characteristic of the practice of medicine and such acts are thus not done "with respect to providing medical care or treatment of a patient" within the meaning of MCL 691.1407(4). In other words, an allegation sufficient to satisfy the "with respect to medical care or treatment of a

patient" requirement will always fall within the sphere of medical malpractice, from which it follows that only medical malpractice claims are exempted from the broad grant of governmental immunity.[1] Thus, in my judgment, claims of ordinary negligence are not included within the plain language of MCL 691.1407(4) which instead demonstrates a clear Legislative intent to create an exception to governmental immunity only in cases of medical malpractice.

Indeed, even if alternative constructions of the statutory language could be advanced, in interpreting exceptions to governmental immunity courts must abide by the principle that exceptions to the broad grant of governmental immunity must be narrowly construed. *Nawrocki*, 463 Mich at 158. Recognition that "with respect to providing medical care or treatment to a patient" refers only to claims of medical malpractice is in accord with the plain statutory language and it is a more narrow approach than that championed by plaintiff. As the more narrow approach, this interpretation—limiting the exception to claims of medical malpractice—should prevail. See *id.*

Moreover, this more narrow interpretation finds further support in the Legislature's decision to amend MCL 691.1407(4) following this Court's decision in *Musulin v Univ of Mich Bd of Regents*, 214 Mich App 277; 543 NW2d 337 (1995). Relevant to this analysis, the Legislature is, of course, free to amend statues, and, in particular, to alter the bounds of governmental immunity. See *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). When the Legislature chooses to act, it is presumed to do so with knowledge of judicial statutory interpretations. *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 372-373; 781 NW2d 310 (2009). "[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation." *Id.* at 380. As a general rule, an amendment is to be construed as changing the

[1] In this regard, numerous acts and decisions, requiring various degrees of specialized knowledge, have been held to necessitate the exercise of medical judgment, including, for example, moving a patient from a wheelchair to an examination table, *Regalski v Cardiology Assoc, PC*, 459 Mich 891; 587 NW2d 502 (1998), training of employees on specialized topics, *Bryant*, 471 Mich at 426-427, and the appropriateness of safety measures to prevent a patient with a known condition from falling out of bed, *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 498; 708 NW2d 453 (2005). It would follow that such exercises of medical judgment involving a patient would be actionable against a governmental agency pursuant to MCL 691.1407(4). In contrast, it is thus notable that, in the present case, plaintiff has brought her claims as ones involving ordinary negligence, without reference to medical malpractice. In this regard, I do not disagree with the majority's indication that wandering was a behavioral symptom of the decedent's condition and that his condition prompted his admission to GRHV for the receipt of supervised care. Arguably, the level of supervision needed for the decedent in light of his condition and symptoms could implicate matters of professional medical judgment, bringing plaintiff's claim within the realm of medical malpractice. See *Sturgis Bank & Trust Co*, 268 Mich App at 498. But, rather than pursue this route, plaintiff framed her complaint as one constituting ordinary negligence, and, in my judgment, such claims are simply not permitted by MCL 691.1407(4).

statute amended. *Huron Twp v City Disposal Sys, Inc*, 448 Mich 362, 366; 531 NW2d 153 (1995). In this regard, "when a judicial decision is released and the Legislature acts to change the language of the statute, it is strong evidence of the disapproval of the judicial interpretation." *GMAC LLC*, 286 Mich App at 373.

In *Musulin*, as in the present case, this Court addressed the exception to governmental immunity created by MCL 691.1407(4). Specifically, in *Musulin*, the plaintiff, who was not a patient, slipped and fell in a hallway while visiting a public hospital. She later filed suit, alleging claims of ordinary negligence. In response, the defendant asserted governmental immunity, arguing, as do defendants in this case, that MCL 691.1407(4) created an exception to governmental immunity only in cases involving medical malpractice. At that time, the relevant exception to governmental immunity provided, in part:

> (4) This act does not grant immunity to a governmental agency *with respect to the ownership or operation of a hospital* or county medical care facility or to the agents or employees of such hospital or county medical care facility . . . .
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> * * *
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> (b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections. [MCL 691.1407(4), as enacted 1986 PA 175 (emphasis added).]

Considering this statutory language, this Court rejected the argument that the exception created by MCL 671.1407(4) was limited to medical malpractice actions. *Musulin*, 214 Mich App at 281-282. This Court explained:

> The term "ownership or operation of a hospital" clearly encompasses more than the hospital's provision of medical services. "Ownership" and "operation" are broad terms that include the full range of activities and functions involved in running a hospital. *Had the Legislature intended to limit the exception as defendant contends, the Legislature could have declared that the act does not grant immunity to a governmental agency with respect to the provision of medical or professional services at a hospital.* The Legislature did not so limit the exception. Thus, the plain language of the statute does not support defendant's argument that only medical malpractice claims fall within the public hospital exception. [*Id.* (emphasis added.)]

After our decision in *Musulin*, the Legislature modified the statute. Among other changes, references to "ownership or operation of a hospital" were removed and the narrower phrase "providing medical care or treatment to a patient" was inserted. See 2000 PA 318. This obvious change to the statute following our decision in *Musulin*, particularly where the change so closely mirrors the language suggested in *Musulin* for the restriction of the exception to medical

malpractice cases, provides strong evidence that the Legislature intended to limit the exception to claims involving medical malpractice. Stated differently, when the Legislature enacted the amendments to MCL 691.1407(4), it did so with knowledge of our decision in *Musulin* and its adopted changes demonstrate an intent to do away with our holding in *Musulin*. See *GMAC LLC*, 286 Mich App at 373. Adhering to this Legislative intent as demonstrated by the plain statutory language, I would hold that MCL 691.1407(4) creates an exception to governmental immunity only in those cases involving allegations of medical malpractice.

Because plaintiff's claims do not involve medical malpractice, I believe defendants were entitled to the protections of governmental immunity and the trial court erred in denying defendants' motion for summary disposition under MCR 2.116(C)(7). For this reason, I would reverse and remand for entry of summary disposition in defendants' favor.

/s/ Joel P. Hoekstra